# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 4 |
| Argument | 6 |
| Conclusion | 8 |


## CITATIONS


Case:

*Offutt* v. *United States*, 348 U.S. 11 ..... 4

Statute and Rule:

18 U.S.C. 401 ..... 2
Rule 42, F. R. Crim. P. ..... 3

# In the Supreme Court of the United States

OCTOBER TERM, 1955

---

No. 928

DORSEY K. OFFUTT, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 4a-10a) has not yet been reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1956. A petition for rehearing was denied on April 6, 1956 (Pet. App. 11a). The petition for a writ of certiorari was filed on May 5, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, after reversal of petitioner's summary conviction for contempt by the judge who had presided at the trial at which petitioner was defense counsel, charges of contempt based on petitioner's conduct at the trial could properly be brought on for trial before another judge on application of the United States Attorney.

2. Whether the fact that three years elapsed during the course of petitioner's appeal, which ultimately resulted in a reversal of his conviction for contempt with direction for a new trial, required dismissal of the charges for lack of a speedy trial.

3. Whether the fact that the judge originally found petitioner guilty by a preponderance of the evidence, and then—a few hours later, but after a notice of appeal had been filed—corrected the judgment to show a finding of guilt beyond a reasonable doubt, entitles petitioner to a judgment of acquittal.

## STATUTES INVOLVED

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure, provides:

**(a) Summary Disposition.**

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

**(b) Disposition Upon Notice and Hearing.**

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled

to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

In *Offutt* v. *United States,* 348 U.S. 11, decided November 8, 1954, this Court reversed petitioner's conviction on four specifications of contempt, which had been affirmed by the Court of Appeals for the District of Columbia Circuit (208 F. 2d 842), arising out of petitioner's conduct as defense attorney in the criminal trial of one Peckham in June 1952. This Court held that the district judge who had presided at the trial had sufficiently "permitted himself to become personally embroiled with the petitioner" to require that another judge sit on the rehearing of the charges (348 U.S. at 17-18). The case was remanded to the District Court on December 28, 1954.

On March 11, 1955, on application of the United States Attorney, Judge McLaughlin, who had been assigned to hear the case,* issued an order re-

* The United States Attorney, in his brief in the Court of Appeals, stated that, after the remand, Judge Holtzoff, who had presided at the trial of the contempt charges, requested Chief Judge Laws to assign another judge to sit on the second contempt hearing. Chief Judge Laws declined to act because of action previously taken by petitioner to disqualify him to sit on disbarment charges against petitioner. Judge Morris,

quiring petitioner to show cause why he should not be punished for contempt for his misbehavior in the presence of the court at the *Peckham* trial (R. 2-5). The specifications were substantially the same as those which had previously been affirmed by the Court of Appeals, *i.e.*, (1) insolent and offensive remarks and gross discourtesy to the court on numerous occasions, (2) persistence in repeating questions previously excluded, (3) asking of prejudicial questions for which there was no foundation, and (4) attempt to create an episode which might lead to a mistrial (R. 2-3).

Petitioner's motion to dismiss on the ground of denial of a speedy trial (R. 6-7) was overruled.

Judge McLaughlin ruled that he would hear oral testimony on the fourth specification, but would determine the other three charges on the record of the *Peckham* trial at which the conduct charged as contumacious occurred (R. 33). No evidence was offered on the fourth charge, and petitioner was acquitted thereon (R. 16).

At the hearing on the charges on May 9, 1955, the record of the *Peckham* trial was introduced in evidence (R. 38). Petitioner made an offer of proof to the effect that he and witnesses whom he would call would testify that he had not been insolent or discourteous, and that, on the contrary, the presiding judge at the *Peckham* trial had exhibited anger and an antagonistic attitude

---

acting as presiding judge, assigned the case to Judge McLaughlin and requested the United States Attorney to take appropriate action to bring the case on for hearing.

toward petitioner (R. 14-15). Judge McLaughlin, in accordance with his previous ruling, declined to permit such testimony (R. 36). On the morning of May 11, 1955, Judge McLaughlin entered an order finding petitioner guilty on charges (1) and (3) by a preponderance of the evidence (R. 16). That afternoon, after petitioner had noted an appeal, but, the United States Attorney informs us, before the duplicate notice had been received by the Court of Appeals, the judge entered a new order finding petitioner guilty on charges (1) and (3) beyond a reasonable doubt (R. 18-19).

The Court of Appeals reversed the conviction and ordered a new trial on the ground that petitioner should have been permitted to offer oral testimony in his defense (Pet. 4a-10a).

## ARGUMENT

Although petitioner's conviction for contempt was reversed by the Court of Appeals, he seeks further review by this Court in an effort to obtain dismissal of the charges or a judgment of acquittal without a retrial. He is not entitled to this further relief.

1. Petitioner argues (Pet. 12-14) that the charges against him should have been dismissed because there was no order appointing the United States Attorney to act for the court until after the United States Attorney applied for an order to show cause why petitioner should not be punished for contempt. As set forth in the footnote, *supra*, p. 4, it appears that in fact the United

States Attorney was requested by the court to investigate the bringing of charges against petitioner. In any event, there is no provision in the rules making a written request by the judge to the United States Attorney a prerequisite to the bringing of charges of contempt on notice. Rule 42(b) provides for notice by the judge in open court "or, on application of the United States Attorney, or of an attorney appointed by the court for that purpose." Clearly the United States Attorney may act without specific appointment by the court for that purpose.

2. Petitioner was not denied a speedy trial by reason of the lapse of three years taken up by the appeal from his original conviction (see Pet. 14-18). A certain amount of delay pending review in the Court of Appeals and in this Court was of course inevitable, but petitioner, as appellant, could undoubtedly have speeded up the review process had he wished to do so. For example, after the initial affirmance by the Court of Appeals on November 19, 1953, petitioner sought rehearing in that court and then applied for an extension of time to file a petition for a writ of certiorari, with the result that his petition was not filed until February 12, 1954 (See Brief in Opposition, No. 589, O.T. 1953).

The record of the *Peckham* trial remains unchanged by the passage of time. Petitioner and such witnesses as he wishes to offer are still available to testify. By securing a new trial on appeal,

petitioner did not acquire immunity from prosecution.

3. Since the Court of Appeals reversed the judgment, the question (Pet. 22-28) as to the validity of the second judgment entered by Judge McLaughlin (see Statement, *supra*, p. 6) is not now in the case. Judge McLaughlin never acquitted petitioner. Even assuming that the second judgment could not have been entered after the appeal had been noted, there would have been a conviction of petitioner on a wrong standard of the burden of proof. Petitioner would then have been entitled to reversal of the judgment with direction for a new trial under the proper standard, exactly the relief which he now has.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
*Solicitor General.*
WARREN OLNEY III,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
*Attorney.*

MAY 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956